TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~517.~~ 292

WELLS, FARGO AND COMPANY, PLAINTIFFS IN ERROR,

vs.

A. McGREGOR, ASSIGNEE OF JOHN M. CLARKSON.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

FILED MARCH 1, 1871.

SUPREME COURT OF THE UNITED STATES.

No. 517.

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vs.

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1 In district court 3rd judicial district, Lewis and Clark County, Montana Territory.

JOHN M. CLARKSON, PL'FF,
vs.
WELLS, FARGO & CO., DEF'TS.

Be it remembered that, on this 10th day of July, A. D. 1868, the above-named plaintiff, John M. Clarkson, recovered a judgment in the district court of the third judicial district of Montana Territory, in & for the county of Lewis & Clark, against the above-named defendant, Wells, Fargo & Co., for the sum of five thousand dollars damages, together with the costs of suit, which said judgment is in the words & figures following, to wit:

In district court 3rd judicial district, county of Lewis & Clark, Territory of Montana.

2 JOHN M. CLARKSON
vs.
WELLS, FARGO & CO.

This action came on regularly for trial. The said parties appeared by their attorneys; a jury of eleven jurors was regularly impanneled, and sworn to try said action, being stipulated & agreed by & between the said attorneys to try said cause by eleven jurors; witnesses on the part of plaintiff and defendant were sworn and examined. After hearing evidence, the argument of counsel, and instructions of the court, the jury retired to consider of their verdict, and subsequently returned into court, and being called, answered to their names, and say they find a verdict for the plaintiff, and assess his damages at the sum of five thousand dollars.

Therefore, by virtue of the law and by reason of the premises
3 aforesaid, it is ordered and adjudged that said plaintiff have and recover from said defendant the sum of five thousand dollars, with interest thereon from the date of the entry hereof, at the rate of ten per cent. per annum, together with the said plaintiff's costs and disbursements incurred in this action, amounting to the sum of five hundred & twenty-four & $\frac{7}{100}$ dollars.
Judgment rendered July 10th, 1868.

Afterwards, on the same day, to wit, July 10th, A. D. 1868, the plaintiff in the above action filed with the clerk of said court a certain instrument in writing, assigning the foregoing judgment to one Archibald McGregor, of which, in words and figures, the following is a copy, to wit:

In consideration of the sum of thirty-five hundred dollars, law-
4 ful money of the United States, to me in hand paid at or before the ensealing and delivery of these presents, by Archibald McGregor, of the county of Meagher, and Territory of Montana, the receipt whereof is hereby acknowledged, I, John M. Clarkson, of the city of Virginia, county of Madison, and Territory aforesaid, do hereby sell, assign, transfer, and set over to the said Archibald McGregor and his assigns all my right, title, and interest in & to a certain judgment recovered by me in the district court of the 3rd judicial district of the said Territory of Montana, in & for the county of Lewis & Clark, against Wells, Fargo & Co., for the sum of five thousand dollars, besides five

hundred twenty-four & $\frac{7}{100}$ dollars costs, making, in all, five thousand five hundred and twenty-four & $\frac{7}{100}$ dollars, on the 9th day of
5 July A. D. 1868, and all *sums &* sums of money that may *that may* be had or obtained by means hereof, together with my interest in the said judgment, being a one-half interest in said judgment, the other half thereof belonging to W. F. Chadwick & R. B. Parrott, for services as attorneys, & by virtue of a lien upon said judgment, hereby constituting and appointing the said Archibald McGregor my true and lawful attorney, irrevocable, with power of substitution and revocation, for his use, and at his costs & charges, to take all lawful ways & means for the recovery of the money due on said judgment to him by virtue hereof, and, on payment, to acknowledge satisfaction of or discharge the same.

In witness whereof I have hereunto set my hand & seal this 10th day of July, A. D. 1868.

6 JOHN M. CLARKSON.

Signed, sealed, & delivered in presence of—
CHA'S W. FOWLER.

[25 cts. United States internal revenue stamp, cancelled.]

TERRITORY OF MONTANA,
County of Lewis & Clark.

On this 10th day of July, A. D. 1868, before me, Cha's W. Fowler, clerk of the district court of the 3rd judicial district of the Territory of Montana, in and for the county of Lewis & Clarke, personally came the above-named John M. Clarkson, to me personally known to be the same person described in and who executed the foregoing assignment of judgment, and acknowledged that he signed the same freely and voluntarily for the uses and purposes therein mentioned.

[SEAL.] Witness my hand and the seal of said court, affixed the day and year last above

7 In the district court, 3d judicial district, Lewis & Clark County, Montana Territory.

JOHN M. CLARKSON }
vs. }
WELLS, FARGO & CO. }

Be it remembered that, on the 14th day of July, A. D. 1868, the dedendant, by its attorneys, Messrs. Woolfolk & Toole filed with the clerk of the said court its notice of appeal in the above-entitled cause, of which, in words & figures, the following is a copy, to wit:

Notice of appeal.

In the district court of the third judicial district of the Territory of Montana, in and for the county of Lewis & Clark.

JOHN M. CLARKSON, PLAINTIFF, }
against }
WELLS, FARGO & CO., A CORPORATION UNder the laws of the Territory of Colorado, defendant. }

8 You will please take notice the defendant in the above-entitled

action hereby appeal to the supreme court of this Territory from the verdict of the jury, and judgment in the above-entitled cause, therein made and entered in the said district court, on the tenth day of July, A. D. 1868, in favor of the plaintiff in said action, & against said defendant, and from the whole thereof.

Dated this thirteenth day of July, A. D. 1868.

Yours, &c.,

WOOLFOLK & TOOLE,
Attorneys for Def't.

To the CLERK of said district court and
Mess. CHADWICK & PARROTT,
Attorneys for Pl'ff.

Service of copy of the within notice given this 13th day of July, A. D. 1868.

CHADWICK & PARROTT,
Att'ys for Pl'ff.

And on the same day, to wit, July 14th, A. D. 1868, defendant
9 in the above-entitled action filed with clerk of said court its undertaking on appeal, and is in the words and figures following, to wit:

Undertaking on appeal.

In the district court of the third judicial district of the Territory of Montana, in and for the county of Lewis & Clarke.

JOHN M. CLARKSON, PLAINTIFF,
against
WELLS, FARGO & CO., A CORPORATION UNder the laws of the Territory of Colorado, defendant.

Whereas the defendant in the above-entitled action appeals to the supreme court of the Territory of Montana from a judgment made and entered against it in said action in the said district court in favor of the plaintiff in said action, on the tenth day of July, A. D. 1868, for the sum of five thousand dollars, for his damages, and also his costs of suit:

10 Now, therefore, in consideration of the premises, and of such appeal, we, the undersigned resident freeholders of the county of Lewis & Clarke, and Territory of Montana, do hereby jointly and severally undertake and promise, on the part of the appellant, that the said appellant will pay all damages and costs which may be awarded against it on the appeal, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound:

And whereas the appellant is desirous of staying the execution of the said judgment & costs so appealed from, we do further, in consideration thereof, and of the premises, jointly and severally undertake and promise, and do acknowledge ourselves further jointly and severally bound in the further sum of twelve thousand dollars, lawful money of the United States, being double the amount named in the
11 said judgment & costs, that if the said judgment appealed from or any part thereof be affirmed, the appellant shall pay the appel-

lee the amount directed to be paid thereby, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs, which shall be awarded against the appellant upon the appeal.

Dated July 13th, A. D. 1868.

HENRY KLEIN, [SEAL.]
JAMES KING. [SEAL.]

TERRITORY OF MONTANA, *Lewis & Clarke County, ss:*

Henry Klein and James King the persons named in and who subscribed the foregoing undertaking as sureties thereto, being severally sworn, each for himself, says that he is worth the amount specified in said undertaking as the penalty thereof, over and above all his
12 just debts and liabilities, exclusive of property exempt from execution.

HENRY KLEIN,
JAMES KING

Subscribed & sworn to before me this 13th day of July, A. D. 1868.
[L. S.] JAMES E. OWINGS,
Notary Public.

Approved & filed July 14th, 1868.

CHA'S W. FOWLER, *Clerk.*

And afterwards, on the 14th day of December, A. D. 1868, a remittitur of the supreme court of said Territory was filed, and is in the words and figures following, to wit:

In the supreme court, Montana Territory, December term, A. D. 1868.

J. M. CLARKSON, APPELLEE,
vs.
WELLS, FARGO & CO., APPELLANTS. } Dec. 7, 1868.

13 The appellee appears by W. F. Chadwick, esq., his att'y, and files a certified copy of the stipulation of the attorneys of the respective parties, and on motion of said appellee:

It is ordered by this court that, in consideration of the terms of said stipulation, the appeal in this cause be dismissed at the costs of the appellant. Therefore, it is considered by the court that the appellee recover of the appellant his costs of appeal herein expended, taxed at fifteen dollars.

Ordered, That a copy of this order be certified to the clerk of the third judicial district court of this Territory.

MONTANA TERRITORY, *Madison County, ss:*

I, Lucius S. Peck, cl'k of the supreme court of said Territory, do hereby certify that the foregoing is a correct copy of the order in the
14 above-entitled cause, made by the judges of said supreme court at Virginia City, in said county and Territory, on the seventeenth day of December, A. D. 1868, as appears on page thirty-three of journal one of said supreme court.

Witness my hand and the seal of said supreme court.

[L. S.] LUCIUS S. PECK,
Clerk Supreme Court, M. T.

I, the undersigned, clerk of the district court of the third judicial district of Montana Territory, in and for the county of Lewis & Clark, do hereby certify that the foregoing are true and correct copies of the notice of appeal, undertaking on appeal, and remittitur of the supreme court, now remaining on file in my office, in the case of John M. Clarkson against Wells, Fargo & Co.

15 In testimony whereof I have hereunto set my hand and affixed the seal of said court, this 7th day of August, A. D. 1869.

[SEAL.] CHA'S W. FOWLER, *Clerk.*
By CHA'S G. REYNOLDS, *Dep. Clk.*

And afterwards, to wit, on the 10th day of August, A. D. 1869, the said appellant, appears by its attorneys, Mess. Woolfolk & Toole, and files in open court a correction of the transcript herein, of which, in words and figures, the following is a copy, to wit:

In district court, 3rd judicial district, Lewis & Clark County, Montana Territory.

JOHN M. CLARKSON
vs.
WELLS, FARGO & CO.

Be it remembered that, on the 19th day of November, A. D. 1868, the parties hereto, by their respective attorneys, filed with the
16 clerk of said court their stipulation, in writing, of which, in words and figures, the following is a copy, to wit:

JOHN M. CLARKSON, PL'FF,
vs.
WELLS, FARGO & CO., DEF'TS.

In the territorial district court, 3rd judicial district, Lewis & Clark County, Montana Territory.

It is hereby stipulated and agreed between the undersigned, attorneys for plaintiff and defendant, that, in consideration of the sum of twenty-five hundred dollars, this day paid by defendants upon the judgment rendered in the above cause, the appeal therefrom to the supreme court of Montana Territory shall be dismissed without damages, and the said twenty-five hundred dollars, paid as aforesaid, shall be in full sat-
17 isfaction of one-half of said judgment rendered herein; the same being the half of said judgment owned by Messrs. Chadwick & Parrott.

Witness our hands this 19th day of November, A. D. 1868.

CHADWICK & PARROTT,
Pl'ff's Atty's.

WOOLFOLK & TOOLE,
Att'ys for Def'ts.

I, the undersigned, clerk of the district court of the third judicial district of Montana Territory, in and for the county of Lewis & Clark, do hereby certify that the foregoing is a true and correct copy of an original stipulation now on file in my office, in the case of John M. Clarkson vs. Wells, Fargo & Co., the same being made out at the request of attorneys for plaintiff.

Witness my hand and the seal of said court affixed, this 5th day of August, A. D. 1869.

[SEAL.] CHA'S W. FOWLER, *Clerk.*
By CHA'S W. REYNOLDS, *Dep. Clk*

And afterwards, to wit, on the 14th day of December, A. D. 1868, an execution was issued out of said court for the ballance due on the foregoing judgment, which said execution is in the following words and figures, to wit:

In the district court of the 3rd judicial district of the Territory of Montana, in and for the county of Lewis & Clark.

In the name & by the authority of Montana Terr'y to the sheriff of the county of Lewis & Clark, greeting:

Whereas, on the 10th day of October, A. D. 1868, John M. Clarkson recovered a judgment in the said district court of the 3rd judicial district of the Territory of Montana, in and for the county of Lewis & Clark, against Wells, Fargo & Co., for the sum of five thousand dollars damages, with interest thereon at the rate of 10 per cent. per annum, till paid, together with his costs and disbursements at the date of said judgment, (and accruing costs,) amounting to the sum of $524 07 *dollars*, as appears to us of record:

And whereas the judgment-roll in the action in which said judgment was entered is filed in the clerk's office of said court in the county Lewis & Clark, and the said judgment was docketed in said clerk's office in the said county, on the day and year first above written, and the sum of $2,517 03, with interest as aforesaid, is now (at the date of this writ) actually due on said judgment—

Now, you, the said sheriff, are hereby required to make the said sums due on the said judgment for damages, with interest as aforesaid, and costs, and accruing costs, to satisfy the said judgment, out of the personal property of said debtor, or if sufficient personal property of said debtor cannot be found, then out of the real property in your county belonging to it, on the day whereon said judgment was docketed in the said county, or at any time thereafter; and make return of this writ within not less than ten nor more than sixty days after your receipt hereof, with what you have done endorsed hereon.

Witness Hon. L. E. Munson, judge of the said 3rd judicial district of the Territory of Montana, at the court-house, in the county of Lewis & Clark, this 14th day of December, A. D. 1868.

Attest my hand and the seal of said court the day and year last above written.

CHA'S W. FOWLER, *Clerk.*

Levy.

$2,500 00 damages, (bal.;) $15 00 cl'k sup. court; $2 10 cl'k 3rd jud. dist.; $ accruing.

And afterwards, to wit, on the 15th day of February, A. D. 1869, the foregoing execution was returned and filed, and attached is the sheriff's returns, in the following words and figures, to wit:

Came to hand Dec. 14th, 1868, at one o'clock, a. m.

W. K. ROBERTS, *Sh'ff.*

Having an execution in my hands bearing even date herewith, in favor of Wells, Fargo & Co., against John M. Clarkson, on a
23 judgment in the district court of the 3rd judicial district of the Territory of Montana, in and for Lewis & Clark County, for the sum of twenty-six hundred and seventy-three $\frac{38}{100}$ dollars, dated Oct'r 26th, 1868, the amount of this execution, and the interest thereon, amounting to twenty-five hundred & forty-four $\frac{50}{100}$ dollars, is applied as an offset to the execution first above mentioned; and this execution is returned satisfied, and the proceeds applied as aforesaid.

Dec. 14th, 1868.

W. K. ROBERTS, *Sheriff.*

And afterwards, to wit, on the 26th day of February, A. D. 1869, a motion was filed by Archibald McGregor, (by his att'y, W. F. Chadwick,) assignee of the foregoing judgment, which is in the words and figures following, to wit:

24 In district court, 3rd judicial district, county of Lewis & Clark, Territory of Montana.

JOHN M. CLARKSON
vs.
WELLS, FARGO & COMPANY.

You will please take notice that I shall move the above-named court at the opening thereof on the 6th day of March, A. D. 1869, or so soon thereafter as counsel can be heard, for an order in the above-entitled action directing the clerk of said court to issue an execution upon the judgment heretofore rendered in said action, to enforce the collection of said judgment, or so much thereof as has been assigned to me by the above-named plaintiff, and further directing the sheriff of the above-named county to use all lawful means & measures to
25 enforce the collection of said execution heretofore issued in said action, and all proceedings thereunder to be quashed & set aside.

That such motion will be made upon the judgment-roll & other proceedings in said action.

Dated Feb. 25th, 1869.

ARCHIBALD McGREGOR,
By his att'y, W. F. CHADWICK.

And afterwards, to wit, on the 27th day of April, A. D. 1869, the court made an order, which is in the words and figures following, to wit:

In the district court of Lewis & Clark, Montana Territory.

JOHN M. CLARKSON
vs.
WELLS, FARGO & Co.

26 Be it remembered that, after due consideration of the motion of plaintiff, heretofore filed in this cause, and after due deliberation of the judgment-roll, assignment, and other records, and papers, & proceedings in said cause, it is ordered by the court, on this 27th day of April, 1869, that the execution heretofore issued in said cause be, and the same is hereby, recalled and the return of the sheriff thereon

be, and the same is hereby, cancelled and held for naught, and it is further ordered by the court, that the clerk of said court issue an execution from said judgment in favor of A. McGregor, the assignee in said cause, for the one-half of said judgment, and the whole of the cost now due in said cause, and that the said execution be placed in the hands of the sheriff of said county, to be served and executed according
27 to law; and it is further ordered by the court that the said sheriff of said county, execute said process of execution, by using all lawful means to collect the ballance due of said judgment, with the whole amount of the costs now due in said cause, and pay the same over to the said A. McGregor, in the manner provided by law,

Given under my hand this 27th day of April, A. D., 1869.

HIRAM KNOWLES, *Judge.*

And afterwards, to wit, on the same day, defendants, by their att'y's, Messrs. Woolfolk & Toole, filed their exceptions to the ruling of the court, in making the above order, which bill of exceptions is in the words and figures following, to wit:

28 J. M. CLARKSON, PL'FF,
vs.
WELLS, FARGO & CO., DEF'TS.

In the territorial district court, 3rd judicial district, Lewis & Clark County, Montana Territory.

The defendants, by their attorneys, Woolfolk & Toole, except to the order of the court in setting aside the sheriff's return in the above cause, and in allowing execution to issue against the defendants in favor of A. McGregor, & also to the fact that said order is made by the court without a hearing or consideration of the affidavits filed by defendants, showing that they had no notice of such assignment to McGregor, prior to obtaining their judgment against Clarkson, and that *equitier* had been acquired by them before receiving notice of such assignment
29 to McGregor, which objection was overruled by the court; to which ruling of the court the defendants' att'y's then and there excepted.

HIRAM KNOWLES, *Judge.*

And afterwards, to wit, on the 30th day of April, A. D. 1869, defendant, by its att'ys, Messrs. Woolfolk & Toole, filed its notice of appeal, which is in the words and figures following, to wit:

J. M. CLARKSON, PL'FF,
vs.
WELLS, FARGO & CO., DEF'TS.

In 3rd judicial district court, 3rd judicial district, Lewis & Clark County, Montana Territory.

You will please take notice that the defendants, Wells, Fargo
30 & Co., in the above-entitled action, hereby appeal to the supreme court of the Territory of Montana, from the order of the court made herein, recalling the execution issued in the name of Clarkson, and directing that an alias execution issue in the name of A. McGregor,

the assignee of said judgment, for the residue thereof, said order being made on the 27th day of April, A. D. 1869.

Dated Helena, April 29th, 1869.

WOOLFOLK & TOOLE,
Att'ys for Def'ts and Appellants.

To CLERK of district court aforesaid,
Messrs. CHUMASERO, & CHADWICK, & R. B. PARROTT,
Att'ys, for Plff.

We hereby accept service of a copy of notice of appeal, this 30th day of April, 1869.

31 TERRITORY OF MONTANA,
County of Lewis & Clark:

James E. Owings, being duly sworn, deposes and says:

That I served a copy of the foregoing notice of appeal on W. F. Chadwick, esq'r., one of the att'ys for def't Clarkson, this 30th day of April, A. D. 1869.

JAMES E. OWINGS.

Subscribed & sworn to before me this 30th day of April, A. D. 1869.
CHA'S G. REYNOLDS,
Deputy Clk.

And afterwards, to wit, on the same day the said defendant, by its attorneys, Messrs. Woolfolk & Toole, filed its undertaking on appeal, which is in the words and figures following, to wit:

32 In 3rd judicial district court. Lewis & Clark County, Montana Territory.

JOHN M. CLARKSON, PL'FF,
vs.
WELLS, FARGO & CO., DEF'TS.

Whereas the above-named defendants have appealed to the supreme court of the Territory of Montana from an order of the district court aforesaid, made on the 27th day of April, A. D. 1869, recalling the execution issued in the name of Clarkson, and directing that an alias execution issue in the name of A. McGregor, the assignee of said judgment, for the residue thereof:

Now, therefore, in consideration of the premises, and of such appeal, we, the undersigned, J. A. Caldwell & D. Hagadorn, citizens of the Territory of Montana, do hereby jointly and severally undertake
33 and promise, on the part of the appellants, that the said appellants will pay all damages and costs which may be awarded against them on the appeal, not exceeding three hundred dollars, for which amount we acknowledge ourselves jointly and severally bound.

And whereas the appellants are desirous of staying the execution of the said order so appealed from, we do further, in consideration thereof, and of the premises, jointly and severally undertake and promise, and do acknowledge ourselves further jointly and severally bound in the further sum of seven thousand dollars, to the effect that if the said order be affirmed, the appellants will obey any order made by the appellate court upon such appeal, and pay all damages & costs that shall

be awarded against the appellants upon such appeal, and any
34 judgment that may be rendered against them on such appeal.
Given under our hands this day of , A. D. 1869.

J. R. CALDWELL. [SEAL.]
D. HAGADORN. [SEAL.]

TERRITORY OF MONTANA,
County of Lewis & Clark, ss:

J. R. Caldwell and D. Hagadorn, being first duly sworn, depose and say that they are each worth the sum of seven thousand dollars over and above all their just debts and liabilities, exclusive of property exempt by law from execution.

J. R. CALDWELL.
D. HAGADORN.

Subscribed & sworn to before me this 30th day of April, 1869.
JAMES E. OWINGS,
Notary Public.

35 MONTANA TERRITORY,
Lewis & Clark County:

I, Cha's W. Fowler, clerk of the district court of the third judicial district of Montana Territory, in and for the county of Lewis & Clark, do hereby certify that the foregoing twenty-two pages, numbered from one to twenty-two, inclusive, contain true and correct copies of original papers, orders, and proceedings on file and of record in my office in the case of John M. Clarkson against Wells, Fargo & Co.

Witness my hand, and the seal of said court affixed, this 27th day of July, A. D. 1869.

CHA'S W. FOWLER, *Clerk*,
By CHA'S G. REYNOLDS,
Deputy Cl'k.

Cl'k's accrued costs, $17 50.

Filed in the office of the clerk of the supreme court M. T., Aug. 9, 1869.

L. S. PECK, *Clerk.*

36

37 And afterwards, on the same day, to wit, the 10th day of August, A. D. 1869, the said appellant, by its att'ys, Messrs. Woolfolk & Toole, file in open court a stipulation, of which, in words *the* figures, the following is a copy, to wit:

J. M. CLARKSON, PL'FF, }
vs. }
WELLS, FARGO & CO., DEF'T. }

In the territorial district court, 3rd judicial district, Lewis & Clark County, Montana Territory.

It is hereby stipulated and agreed between the undersigned attorneys that all affidavits filed in the above cause may be used as if made a part of the transcript of the clerk, and that no objection will be made
38 to the introduction of said affidavits on account of not being in-

corporated into said transcript, reserving, however, the right to make all objections to said affidavits on account of their immateriality.

CHADWICK & PARROTT,
Pl'ff's Att'ys.
WOOLFOLK & TOOLE,
Att'ys for Def'ts.

Filed Aug. 10, '69.

L. S. PECK, *Clerk.*

39 And afterwards, to wit, on the same day, the appellant, by its attorneys aforesaid, filed in open court the affidavit of R. T. Gillespie, of which, in words and figures, the following is a copy, to wit:

R. T. GILLESPIE, being first duly sworn, deposes and says: That he is the agent of Wells, Fargo & Co., at their office in Helena City, Montana Territory; that no notice was ever given to said Wells, Fargo & Co., or any of their agents, as far as affiant can ascertain, of any assignment of the judgment of J. M. Clarkson vs Wells, Fargo & Co., to Archibald McGregor or any other person; that affiant, as managing agent of said company, never heard of said assignment of said judgment to McGregor until long after Wells, Fargo & Co. had themselves obtained the
40 judgment against J. M. Clarkson, which has been offset in this case against the said judgment of Clarkson.

Affiant further states that Wells, Fargo & Co. had instituted an action against J. M. Clarkson, jointly with his copartners, long before said Clarkson obtained the judgment assigned to McGregor, and that Wells, Fargo & Co. obtained their judgment against Clarkson before the judgment of Clarkson against them had been finally adjudicated; an appeal from said judgment being still pending at the time that Wells, Fargo & Co. obtained their judgment as aforesaid against Clarkson, and that the action on which said judgment was obtained was pending against Clarkson at the time he assigned his judgment to McGregor.

Affiant further states that he has been reliably informed and
41 believes, that the judgment aforesaid against Wells, Fargo & Co. was assigned in payment of a debt due from Drake, Clarkson & Co. to the said McGregor, who was not an individual creditor of the said Clarkson, but a creditor of the firm of Drake, Clarkson & Co.

Affiant further states that the firm of Drake, Clarkson & Co., and every member thereof, were insolvent at the time said Clarkson assigned said judgment to McGregor, and are still insolvent; and that the claim upon which Wells, Fargo & Co. obtained said judgment against Clarkson is, and has always been, perfectly worthless to them, except as an offset to the judgment obtained against them by the said Clarkson.

R. T. GILLESPIE.

42 Subscribed & sworn to before me this 5th day of March, 1869.
[L. S.] JAMES E. OWINGS,
Notary Public.

Filed March 6th, 1869.

CHA'S W. FOWLER, *Clerk.*

Filed Aug. 10, 1869.

L. S. PECK, *Clerk.*

And afterwards, to wit, on the same day, the said attorneys filed, in open court, the additional affidavit of R. T. Gillespie, of which, in words and figures, the following is a copy, to wit:

JOHN M. CLARKSON, PL'FF,
vs.
WELLS, FARGO & CO., DEF'TS.

COUNTY OF LEWIS & CLARKE, *Territory of Montana, ss:*

43 R. T. Gillespie, being first duly sworn, deposes and says: That he is managing agent for the defendants in the above-entitled cause, at Helena, Montana Territory; that he never heard that A. McGregor was the assignee of any portion of the judgment of Clarkson vs. defendants, until about the day of 1868, long after defendants had obtained their judgment against the said J. M. Clarkson.

Affiant further states, that as agent for Wells, Fargo & Co., he had several opportunities to compromise with J. M. Clarkson, the judgment of J. M. Clarkson vs. Wells, Fargo & Co., for less than four thousand dollars in money, while the appeal from said judgment was pending, and after said assignment to A. McGregor, but that affiant having no notice of the assignment of any portion of said judgment
44 to A. McGregor, relied upon setting off defendant's judgment against J. M. Clarkson, against Clarkson's judgment aforesaid, and failed and refused to compromise said judgment, on account of being thus misled as to the true ownership of said judgment. The said Clarkson always made the impression upon affiant, that he was the owner of said judgment.

Affiant further states, that they employed the law firm of Woolfolk & Toole to prosecute their suit against the said J. M. Clarkson et al; that they paid the said Woolfolk & Toole the sum of two hundred dollars for prosecuting the said suit to final judgment, besides paying the costs of court (the said Clarkson being insolvent;) that defend-
45 ant had no other motive to prosecute said suit to final judgment except to set off the same against the aforesaid judgment of the said Clarkson, if the same should be finally affirmed in the supreme court; that if defendants had known of the assigment of the said judgment to McGregor, they would never have incurred the expenses of prosecuting said suit to final judgment, but would have dismissed the same, and thereby saved at least one hundred and fifty dollars in expenses in prosecuting said suit to judgment.

Affiant further states, that if defendants are now compelled to pay to A. McGregor the residue of said judgment remaining unpaid, it will have cost the defendants at least twelve hundred dollars more than it would have alone, had they received notice of the assignment of
46 said judgment to McGregor.

Affiant further states that, relying upon the fact that said assignment had been made without the defendants having any notice thereof, and that defendants had obtained said judgment against J. M. Clarkson long before they had any notice that said Clarkson had assigned any portion of his judgment against defendants, this affiant, as agent for defendants, compromised said case of Clarkson versus Wells, Fargo & Co., and consented to dismiss the appeal (then pending) of said cause to the supreme court of Montana Territory, and also paid one-half of said judgment to W. F. Chadwick, esq'r, for the purpose of setting off defendants' judgment against Clarkson, against the
47 residue of said judgment of Clarkson vs. defendants.

Affiant further states that the defendants would not have dismissed this appeal from said judgment, or paid any portion of said judgment, had they received notice of said assignment to McGregor, but would have prosecuted their appeal from said judgment, and affiant believes would have reversed the same.

R. T. GILLESPIE.

Subscribed & sworn to before me this 30th day of March, A. D. 1869.

[SEAL.] JAMES E. OWINGS,
Notary Public.

(Endorsed thereon as follows, to wit:) Filed March 31st, 1869. Cha's W. Fowler, clerk. Filed Aug. 10th, 1869. L. S. Peck, clerk.

48 And afterwards, to wit, on the same day, the said appellants filed in open court the affidavit of Alex. M. Woolfolk and Edwin W. Toole, of which, in words & figures, the following is a copy, to wit:

JOHN M. CLARKSON, PLAINTIFF,
vs.
WELLS, FARGO & Co., DEFENDANTS.

In the district court, 3rd judicial district, in & for the county of Lewis & Clark, and Territory of Montana.

ALEX. M. WOOLFOLK and EDWIN W. TOOLE, being duly sworn, say: That they comprise the law firm of Woolfolk & Toole, and as such were and are employed as attorneys for the defendants in the above-
49 entitled cause, as also attorneys for the plaintiff in a certain action wherein the said Wells, Fargo & Co., was plaintiff, and said plaintiff et al., defendants; that sometime after the rendition of the judgment in the above-entitled cause, and before the recovery of judgment in the case of Wells, Fargo & Co. against the said John M. Clarkson, the said Clarkson frequently called upon these affiants, as attorneys aforesaid, after said assignment of said judgment, to compromise their matters in the above action wherein a judgment had been recovered against said defendant for the sum of five thousand dollars; that the same was then pending on appeal, and could have been compromised at the sum of four thousand dollars; but that these
50 affiants knowing of the insolvency of said defendants in the case of Wells, Fargo & Co. vs. said John M. Clarkson et al., and relying upon the judgment they expected to obtain against said Clarkson, refused to so compromise and settle the same; that they had no notice of the assignment of the judgment in the above-entitled action until after the said Wells, Fargo & Co. had recovered their judgment against said Clarkson, and that said appeal was pending when said judgment was rendered; that said Wells, Fargo & Co. have paid these affiants the sum of two hundred dollars for prosecuting said demand to judgment as aforesaid, which was useless and unavailing to it, save as *as* a set off as aforesaid.

EDWIN W. TOOLE.
ALEX. M. WOOLFOLK.

51 Subscribed & sworn to before me, this 30th day of March, 1869.

[SEAL.] JAMES E. OWINGS,
Notary Public.

(Endorsed, on same, as follows, to wit:) Filed March 31st, 1869. Cha's W. Fowler, clerk. Filed Aug. 10, 1869. L. S. Peck, clerk.

And afterwards, to wit, on the same day, the said respondent filed in open court the affidavit of A. McGregor, of which, in words and figures, the following is a copy, to wit:

In district court, 3rd judicial district, county of Lewis & Clark, Territory of Montana.

JOHN M. CLARKSON, A. MCGREGOR, ASSIGNEE,
versus
52 WELLS, FARGO & CO.

A. MCGREGOR, being first duly sworn, deposes and says: That on the day of July, A. D. 1868, and on the day that the judgment in said action was rendered, and immediately after the entry thereof, the said John M. Clarkson assigned to this deponent one-half of said judgment, the other half thereof belonging to Messrs Chadwick and Parrott, the attorneys of the above-named John M. Clarkson. That, at the time of the assignment of the said one-half of said judgement, the said Clarkson was indebted unto this deponent for the sum of three thousand five hundred dollars, said indebtedness being for money that the said Clarkson had received for goods belonging to this deponent and sold
53 by said Clarkson, & which said money the said Clarkson had converted to his own use. That, at the time of the said assignment, this deponent was about issuing an attachment to garnishee the said judgment, and that said Clarkson agreed to and did make the said assignment of said judgment to this deponent in consideration that this deponent should not commence said attachment suit. That this deponent gave him, the said Clarkson, credit for said amount of the said one-half of said judgment. That, the same afternoon that this deponent had said judgment assigned to him, he called on R. T. Gillespie, the managing agent of the said defendant, and informed him that the said one-half of said judgment had been assigned to this deponent, and
54 that frequently after that time & long before the month of October, 1868, this deponent conversed with Col. A. M. Woolfolk relative to this deponent's one-half of said judgment to ascertain if the same could not be settled. That said Woolfolk informed this deponent that said cause had been appealed, and that nothing would be done about it until the meeting of the supreme court of said Territory. That this deponent knows of his own knowledge that the said defendant, through its said agent and said attorneys, had actual knowledge of the said assignment to this deponent immediately after said assignment was executed, and long before the recovery of the judgment of Wells, Fargo & Co. vs. Clarkson et al. That the said John M. Clarkson
55 had no authority to make any settlement or compromise of the said one-half interest of said judgment belonging to this deponent, and that this deponent never authorized any person whomsoever to settle said one-half of said judgment for less than the full amount thereof.

A. MCGREGOR.

Subscribed & sworn to before me this 19th day of April, 1869.

W. F. CHADWICK,
Notary Public.

(Endorsed on same as follows, to wit:) Filed April 24th, 1869. Cha's W. Fowler, clerk. Filed Aug. 10th, 1869. L. S. Peck, cl'k S. court.

56 And afterwards, to wit, on the same day the said respondent filed in open court the affidavit in writing of W. F. Chadwick, of which, in words and figures, the following is a copy, to wit:

In district court, 3rd judicial district, county of Lewis & Clark, Territory of Montana.

JOHN M. CLARKSON, A. MCGREGOR, ASSIGNEE, } *vs.* WELLS, FARGO & CO. } *88.*

W. F. Chadwick, being first duly sworn, deposes and says: That he was one of the attorneys of the above-named John M. Clarkson in said action against the above-named defendant.

That, on the day of July, A. D. 1869, and the day when
57 judgment in said action was entered, this deponent and R. B. Parrot, his partner, filed their lien upon said judgment for the undivided one-half thereof. That the other one-half of said judgment was assigned by the said Clarkson to the said A. McGregor.

That this deponent and the said Parrott were attorneys for the said McGregor, and a demand against the said Clarkson for the sum of three thousand five hundred dollars had been left with this deponent and said Parrott for collection; that, just previous to the rendition of said judgment, the said McGregor applied to this deponent to commence suit upon said demand against said Clarkson, and have any judgment that said Clarkson might recover garnisheed or attached; that this de-
58 ponent requested said McGregor to take said demand to some other attorney, as this deponent and said Parrott were attorneys for the said Clarkson.

That, upon the day of the rendition of said judgment, the said Clarkson and said McGregor agreed that his, the said Clarkson's, portion of said judgment should be assigned to the said McGregor in part payment of the said indebtedness from the said Clarkson to the said McGregor, and this deponent then and there drew the assignment thereof, which is now on file in said cause.

That such assignment was duly entered in the judgment docket book and entered in the minutes of the clerk of said court, and read in open court on the morning following said assignment.

59 That the said Clarkson had no power or control over the said judgment after the assignment to the said McGregor; that he had no power to settle or compromise the one-half of said judgment belonging to this deponent and the said R. B. Parrott, and that this deponent verily believes that the said Clarkson had no control over the said one-half belonging to the said McGregor, and had no authority to settle or compromise the same; that the same was left with this deponent, as the attorney of the said McGregor, for collection, but this deponent was not authorized to receive less than the full amount of the said one-half of said judgment.

W. F. CHADWICK.

60 Subscribed & sworn to before me this 20th day of April, A. D. 1869.

R. E. ARICK.
Notary Public.

(Endorsed as follows, to wit:) Filed April 24th, 1869. Cha's W. Fowler, clerk. Filed August 10, 1869. L. S. Peck, clerk.

And afterwards, to wit, on the same day, the said respondent filed in open court the affidavit in writing of H. P. A. Smith, of which, in words and figures, the following is a copy, to wit:

In district court of 3rd judicial district, Lewis & Clarke County, Montana Territory.

61 JOHN M. CLARKSON
vs.
WELLS, FARGO & CO.

H. P. A. SMITH, being duly sworn, deposes and says:

That he is one of the firm of Smith & Cullen, practicing attorneys On or about the day of July, A. D. 1868, Archibald McGregor applied to said firm to commence a suit against the said John M. Clarkson on a note for thirty-five hundred dollars, and had instructions to attach any judgment that said Clarkson might recover against Wells, Fargo, & Co.; that the papers in said suit were made out, and the action would have at once proceeded but that the matter was arranged by said Clarkson giving to said McGregor an assignment of one-half of the judgment recovered by said Clarkson against the said Wells, Fargo & Co. And further deponent saith not.

H. P. A. SMITH.

62 Subscribed & sworn to before me this 20th day of April, 1869.
W. F. CHADWICK,
Notary Public.

(Endorsed thereon as follows, to wit:) Filed April 24th, 1869. Cha's W. Fowler, clerk. Filed Aug. 10th, 1869. L. S. Peck, clerk supreme court.

And afterwards, to wit, on the same day, the said appellant, by its attorneys, filed in open court the affidavit of R. T. Gillespie, of which, in words and figures, the following is a copy, to wit:

J. M. CLARKSON, PL'FF,
vs.
WELLS, FARGO & CO., DEF'TS.

63 In the territorial district court, 3rd judicial district, Lewis & Clark County, Montana Territory.

R. T. GILLESPIE, being first duly sworn, deposes and says, that he is positive that A. McGregor never notified him in regard to his having obtained an assignment of the interest of John M. Clarkson in one-half of the judgment of Clarkson vs. Wells, Fargo & Co., or of any interest whatever in said judgment.

Affiant is positive that he never heard that the said McGregor had obtained any interest whatever in said judgment, until he was so informed by W. F. Chadwick, long after the defendants had obtained a judgment against the said J. M. Clarkson; that affiant was induced
64 to settle the one-half interest in said judgment, claimed by Messrs. Chadwick and Parrott for the reason that, having received no notice of the assignment of a part of said judgment to McGregor, this affiant was advised and believed that defendant's judgment obtained

against Clarkson would be a valid offset to the remainder of said Clarkson's judgment against defendants.

R. T. GILLESPIE.

Subscribed & sworn to before me this 27th day of April, A. D. 1869.
[SEAL.] JAMES E. OWINGS,
Notary Public.

(Endorsed thereon as follows, to wit:) Filed April 27th, 1869. Cha's W. Fowler, clerk. Filed Aug. 10th, 1869. L. S. Peck, clerk S. C.

65 And afterwards, to wit, on the same day, the said respondent filed in open court the affidavit of R. B. Parrott, of which, in words and figures, the following is a copy, to wit:

TERRITORY OF MONTANA,
County of Lewis & Clark, ss:

JOHN M. CLARKSON
vs.
WELLS, FARGO & CO.

I, R. B. PARROTT, being first duly sworn, on oath, depose and say: That I was one of the attorneys for plaintiff in the above-entitled cause; that, after said judgment in said cause was rendered in the district court of said county, I had frequent conversations with E. W. Toole,
66 esq'r, one of the attorneys for the defendant, in regard to the payment of the same.

I stated to him that I expected to go to the States in the fall; that our fees were to be realized from the judgment. He spoke of a claim the defendant had against Clarkson, and that he wanted that settled. I remember distinctly of having stated to Mr. Toole that, as I understood it, Mr. Clarkson had assigned or transferred the one-half of the judgment to Mr. A. McGregor to apply in part payment on an indebtedness then due from him, Clarkson, to Mr. McGregor, on account of certain liquors which Mr. McGregor had left with Mr. Clarkson to be sold by him on commission; that he, Clarkson, felt that it was the debt
67 that should be first paid, as he had appropriated the money belonging to McGregor realized from the sales of the goods on commission, and that the one-half of the judgment was assigned to McGregor for that purpose, and that the said one-half of the judgment thus assigned was McGregor's and not Clarkson's. These conversations I had with Mr. Toole, as well before I left for California, as after I returned. I hoped to be able to go directly to the States from Salt Lake, as soon as I arrived at that point, without returning to Helena, and made my arrangements with Mr. Chadwick, then my law partner, to send me my proportion of the fee, if paid in. It was not paid when I arrived at Salt Lake, and a term of the court being called, I re-
68 turned to Helena, and was present at the October term, when the judgment was rendered against Clarkson, and in favor of Wells, Fargo & Co.

R. B. PARROT.

Subscribed & sworn to before me this 26th day of April, 1869.
CHA'S G. REYNOLDS,
Deputy Clerk.

(Endorsed thereon, as follows, to wit:) "Filed April 27th, 1869. Cha's W. Fowler, clerk, by Cha's G. Reynolds, D. C. Filed Aug. 10th, 1869. L. S. Peck, clerk supreme court."

69 WELLS, FARGO & Co.
vs.
JNO. M. CLARKSON.

Copies of papers accompanying the transcript on appeal in the case of J. M. Clarkson vs. Wells, Fargo & Co. Filed Aug. 9, 1869.

L. S. PECK,
Clerk Supreme Court of Montana Territory.

70 *Index to transcript.*

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71 In district court, 3rd judicial district, Lewis & Clark County, Montana Territory.

WELLS, FARGO & COMPANY, A CORPORATION under and by virtue of the laws of the Territory of Colorado,
vs.
JOHN M. CLARKSON, C. W. NORMAN, AND FRANK G. Drake, doing and transacting business under the name, firm, and style of Drake, Clarkson & Co.

Be it remembered that, on the 13th day of December, A. D. 1865, plaintiff, by its attorneys Messrs. Woolfolk, Pemberton & Toole, filed with the clerk of the district court of the 3rd judicial district of the Territory of Montana in and for the county of Lewis and Clark,
72 its complaint against the above-named defendants which said complaint is in the following words and figures, to wit:

WELLS, FARGO & CO., A CORPORATION UNDER and by virtue of the laws of the Territory of Colorado, plaintiffs,
vs.
JOHN M. CLARKSON, C. W. NORMAN, FRANK G. Drake, doing and transacting business under the name, firm, & style, Drake, Clarkson & Co., defendants.

In the district court, 3rd judicial district, in and for the county of Edgerton, and Territory of Montana. January term, A. D. 1868.

The above-named plaintiffs, by Woolfolk, Pemberton & Toole, its

attorneys, complains of the defendants therein, and for cause,
73 therefore shows unto this hon. court that, at the time hereinafter mentioned, they were, and now are, a corporation duly incorporated under and by virtue of the laws of the Territory of Colorado; that, at the time aforesaid, said defendants were doing and transacting business under the name, firm, and style of Drake, Clarkson & Co.; that said defendants under their firm, name, and style aforesaid, made, executed and delivered their certain promissory note to one M. Rudolph or order, for the sum of thirteen hundred and forty-four dollars and seventy-two cents ($1,344 72) for value received, negotiable and payable sixty days (60 days) after the date thereof; that, on the day and date last aforesaid, said defendants under their firm, name, and style aforesaid, made, executed, and delivered their certain other promissory note for like amount, for value recieved, to said M. Rudolph, pay-
74 able in sixty days after the date thereof, copy of which said notes are herewith filed, marked Exhibit "A," and made part of this complaint; that said M. Rudolph, afterwards and before the maturity of said notes, indorsed in blank and delivered said notes.

And that plaintiff now is the lawful owner and holder of the same, for value; that said defendants have failed and refuse to pay the sums aforesaid, although often requested so to do; that said notes so due and owing from said defendants to plaintiffs amount to the sum of twenty-six hundred and eighty-nine dollars and forty-four cents, for which it asks judgment with the legal interest thereon according to the tenor of said notes, together with the costs and charges in this behalf expended.

Plaintiffs further says that said defendants are indebteded to
75 it in the sum of four hundred ($400 00) dollars on an account current made with Hussey, Dahler & Co., of Virginia City, M. T., and by them sold, transferred, and assigned to plaintiffs for a valuable consideration; that said amount is now due and unpaid plaintiff, an d said defendants failed and refuses, and still fail and refuse, to pay the same, although requested so to do. Wherefore pl'ffs likewise ask judgment for said last-mentioned sum of four hundred dollars, and said sum of $2,689 44, asking in all thirty hundred & eighty-nine & $\frac{44}{100}$ dollars, with interest & costs of suit.

WOOLFOLK, PEMBERTON & TOOLE,
Pl'ffs' Att'ys.

EXHIBIT "A."

1,344 72.] VIRGINIA CITY, M. T., *April 22d*, 1867.

Sixty days after date we promise to pay to M. Rudolph or order
76 the sum of ($1,344 72,) thirteen hundred and fourty-four dollars and seventy-two cents, in U. S. legal-tender notes, for value received, bearing (5) five per cent. interest from date of maturity.

(Signed) DRAKE, CLARKSON & CO.

[U. S. revenue stamps amounting to seventy c'ts attached.]

$1,344 72.] VIRGINIA CITY, M. T., *April 22d*, 1867.

Sixty days after date we promise to pay to M. Rudolph or order the sum ($1,344 72,) thirteen hundred and fourty-four dollars and seventy-two cents, in U. S. legal-tender notes, for value received, bearing (5) five per cent. interest from date of maturity.

(Signed) DRAKE, CLARKSON & CO.

[U. S. revenue stamp amounting to seventy cents cancelled.]

And on the same day, to wit, December 13th, A. D. 1867, sum-
77 mons was issued out of said court, which, in words and figures, the following is a copy, to wit:

TERRITORY OF MONTANA,
County of Edgerton:

3rd judicial district court.

WELLS, FARGO & CO., A CORPORATION UNDER and by virtue of the laws of the Territory of Colorado, pl'ffs,
vs.
JOHN M. CLARKSON, C. W. NORMAN, FRANK G. Drake, doing and transacting business under the name, firm, and style of Drake, Clarkson & Co., def'ts.

The Territory of Montana, to John M. Clarkson, C. W. Norman, & Frank G. Drake, the afore-named defendants, greeting:

You are hereby summoned and requested to appear, on or before the first day of the next term of the court aforesaid to be held at the
78 court-house in Helena, county and Territory aforesaid, on the 6th day of January, A. D. 1868, then and there to answer the complaint in the above-entitled action, which has been filed in the office of the clerk of the court aforesaid.

And if you fail to answer such complaint within the time aforesaid judgment by default will be taken against you, as in said complaint demanded.

This action is brought to recover judgment in the sum of (in the aggregate $3,089 44,) thirty hundred & eighty-nine & $\frac{44}{100}$ dollars, on two promissory notes in favor of M. Rudolph or order, and indorsed in blank and delivered to these pl'ffs, and on an account current made with Hussey, Dahler & Co., of Virginia City; also assigned to pl'ffs, with interest thereon, besides the costs of this action.

79 Witness Hon. L. E. Munson, judge of said court, and my hand and the seal of said court affixed, this 13th day of December, A. D. 1867.

[L. S.] CHA'S W. FOWLER, *Clerk.*

Endorsed on the foregoing summons is the sheriff's return, to wit:

Served the within summons by reading the same to John M. Clarkson this 16th day of December.

DAVID McCRANOR,
Sheriff of Madison Co.

Filed Oct'r 26th, '68. Cha's W. Fowler, clerk.

And afterwards, to wit, on the 2nd day of January, A. D. 1868, defendants, by their attorneys, Messrs. Chadwick & Parrott, filed with the clerk of said court the demurrer to plaintiff's complaint herein, which said demurrer is in the following words & figures, to wit:

80 In district court, 3rd judicial district, county of Edgerton, Territory of Montana.

WELLS, FARGO & CO., A CORPORATION, &C.,
vs.
DRAKE, CLARKSON & CO.

And now comes the above-named defendants by Chadwick and Parrott, their attorneys, and demur to the complaint of the plaintiff herein, and for cause of demurrer state that the said complaint does not state facts sufficient to constitute a cause of action in this—

1st. That the said complaint fails to state when & where the said promissory notes mentioned in said complaint were made and executed.

2nd. That the said complaint fails to show that the said promis-
81 sory notes were due & payable at the time of commencing the said action.

3rd. That the said complaint fails to show when & where, or to whom the said M. Rudolph indorsed the said promissory notes.

4th. That the said complaint fails to allege that the said promissory notes were stamped with U. S. internal rev. stamps as required by law.

5th. That said complaint fails to show for what the said account current was due the said Hussey, Dahler & Co., or when & where such indebtedness was contracted, & that the said plaintiff has any legal right to sue for the same.

Wherefore the said defendants pray judgment against the said plaintiffs.

CHADWICK & PARROTT,
Def'ts Att'ys.

82 And afterwards, on the 4th day of Jan'y, A. D. 1868, plaintiffs, by their attorneys, Messrs. Woolfolk, Pemberton & Toole, filed with the clerk of said court its amended complaint, of which, in words & figures, the following is a copy:

WELLS, FARGO & CO., A CORPORATION DULY incorporated under and by virtue of the laws of the Territory of Colorado, plaintiff,
against
JOHN M. CLARKSON, C. W. NORMAN, FRANK G. Drake, doing and transacting business under the company name and style of Drake, Clarkson and Co., defendants.

In the district court, 3rd judicial district, in and for the county of Edgerton, and Territory of Montana. January term, 1868.

83 Now comes the plaintiff in the above-entitled cause, by Woolfolk, Pemberton and Toole, its attorneys, and for amended complaint herein, shows unto this hon. court that, at the time hereinafter mentioned, this plaintiff was, and now is, a corporation, duly incorporated under and by virtue of the laws of the Territory of Colorado. That, at the time of making the promissory notes and contracting the indebtedness hereinafter mentioned, said defendants were copartners in trade, doing and transacting business under the company name and style of Drake, Clarkson & Co.; that said defendants, under their firm-name and style aforesaid, at Virginia City, in the Territory of Montana, on the 22nd day of April, A. D. 1867, made, executed, & delivered to

M. Rudolph their certain promissory note for the sum of thirteen
84 hundred and fourty-four dollars and seventy-two cents, for value received, due and payable sixty days after the date thereof, in U. S. legal tender notes, with five per cent. interest thereon from the date of maturity; that, on the day and at the place aforesaid, said defendants, under their firm, name, and style aforesaid, made, executed, and delivered to the said M. Rudolph their certain other promissory note for the sum of thirteen hundred and fourty-four dollars and seventy-two cents, for value received, due and payable sixty days after the date thereof, in U. S. legal tender notes, with five per cent. interest thereon from maturity; that said notes were duly stamped with United States internal revenue stamps, and said stamps cancelled as required by law; that afterwards, to wit, before the maturity of said notes, at Virginia City, in the Territory aforesaid, said M. Rudolph assigned by in-
85 dorsement on the back of said note, and delivered the same so indorsed, to Messrs. Hussey, Dahler & Co., bankers, in said city of Virginia, and Territory aforesaid, for a valuable consideration, whereby the said Hussey, Dahler & Co. became, and were, the lawful owners and holders of said notes: that, afterwards, and before the commencement of this action, said Hussey, Dahler & Co., being so the lawful owners and holders of said notes, at said city of Virginia, and Territory of Montana, assigned by endorsement, and delivered said notes so endorsed to plaintiffs, for a valuable consideration, whereby this plaintiff became, and now is, the lawful owner and holder of said notes; that said notes are now due, and said defendants have failed and still fail and refuse to pay the same or any part thereof, although often requested so
86 to do; that the aggregate amount of the said promissory notes so due plaintiff as aforesaid, is the sum of twenty-six hundred and eighty-nine dollars and fourty-four cents, with interest thereon from the date of maturity thereof.

Plaintiff further state that said defendants, under their firm name and style aforesaid, were justly indebted to the said Hussey, Dahler & Co., bankers as aforesaid, at said city of Virginia, and Territory of Montana, in the sum of four hundred dollars, on an account current with said bank in clean gold dust, currency, and trade dust transactions, which said sum became, and was, due said Hussey, Dahler & Co., bankers as aforesaid, on the 3rd day of September, A. D. 1867; that, afterwards, to wit, on the 2nd day of December, A. D. 1867, at said city of Virginia, in the Territory of Montana aforesaid, said Hussey, Dahler & Co.
87 assigned, and delivered said account so assigned, to plaintiff, who now is the lawful owner and holder thereof; that said sum of four hundred dollars is now due and unpaid, and said defendants still fail and refuse to pay the same, although often requested so to do. Plaintiff further shows unto this hon. court that there is now due upon said promissory notes and said account current to this plaintiff from said defendants the sum of three thousand and eighty-nine dollars and fourty-four cents, with interest, according to the tenor and effect of said notes and legal interest upon said account; for all of which plaintiff prays judgment with the costs and charges in this behalf expended.

WOOLFOLK, PEMBERTON & TOOLE,
Att'ys for Pl'ff.

88 Service of a copy of the within amended complaint is hereby admitted.

Dated Jan'y 4th, 1868.

CHADWICK & PARROTT,
Def'ts Att'ys.

And afterwards, to wit, on the 15th day of January. 1868, defendants, by their attorneys, Messrs. Chadwick and Parrott, filed with the clerk of said court their answer, in the following words and figures, to wit:

In district court, 3rd judicial district, county of Edgerton, Territory of Montana.

WELLS, FARGO & CO.
vs.
DRAKE, CLARKSON & CO.

And now come the above-named defendants by Chadwick &
89 Parrott, their attorneys, and for answer to the complaint of plaintiff herein, deny each & every allegation in said complaint contained.

Wherefore the said defendants pray judgment for cost of action.

CHADWICK & PARROTT,
Def'ts Att'ys.

And afterwards, to wit, on the 26th day of October, A. D. 1868, this cause came on regularly to be tried, and the parties, plaintiff and defendant, by their respective attorneys, expressly waive a jury.

Upon motion of plaintiff's attorneys it is ordered that this cause be dismissed as to C. W. Norman and F. G. Drake, two of the above named defendants.

Whereupon the trial of the cause proceeds as against defendant J. M. Clarkson.

Charles L. Dahler was then sworn & examined as a witness upon the part of plaintiff, and the defendant has no witness.

90 Whereupon, after evidence and due deliberation by the court, the court's finding of facts is filed, of which, in words and figures, the following is a copy, to wit:

WELLS, FARGO & CO., A CORPORATION DULY incorporated under and by virtue of the laws of the Territory of Colorado, pl'ffs,
vs.
JOHN M. CLARKSON ET AL., DEF'TS.

This cause coming on to be heard, the following facts and conclusions of law were found by the court, to wit:

That, on the 22d day of April, A. D. 1867, the defendants, under their firm name, Drake, Clarkson & Co., executed and delivered to M. Rudolph, or order, their two several promissory notes, whereby they
91 promised to pay said Rudolph or order, in each note, the sum of thirteen hundred and forty-four $\frac{72}{100}$ dollars sixty days after date, bearing five per cent. per annum interest after maturity. That, on the 15th day of June, A. D. 1867, the defendants paid on one of said notes for thirteen hundred and fourty-four $\frac{72}{100}$ dollars, the sum of five hundred and thirty-five dollars. That the said defendants were also indebted to Hussey, Dahler & Co. in the sum of three hundred and fifty-two dollars on an open account. That M. Rudolph assigned said notes to the said Hussey, Dahler & Co., and that afterwards, for a valuable consideration, the said Hussey, Dahler & Co. assigned said notes and account to the plaintiffs, who are now the lawful holders and owners thereof. That there is now due the plaintiffs from defendants'

92 said notes and account, the sum of twenty-six hundred and seventy-three $\frac{38}{100}$ dollars. And, as a conclusion of law, that plaintiffs are entitled to judgment against the defendants for the above amount of twenty-six hundred and seventy-three $\frac{38}{100}$ dollars and costs of suit. But plaintiffs having dismissed as to all defendants except J. M. Clarkson, who alone was served, it is ordered that judgment be rendered against him individually for the above amount.

HIRAM KNOWLES,
Associate Justice of S. C. for M. T.

Thereupon judgment was entered in accordance with the foregoing findings of the court, which said judgment is in the following words and figures, to wit:

In district court 3 judicial district, Lewis & Clark County, Montana Territory.

93 WELLS, FARGO & CO., A CORPORATION duly incorporated under & by virtue of the laws of Colorado,
versus
J. M. CLARKSON, C. W. NORMAN, & FRANK G. Drake, doing & transacting business under the company name and style of Drake, Clarkson & Co.

This cause came on regularly for trial on the 26th day of October, A. D. 1868, Woolfolk & Toole appearing as counsel for plaintiffs, and Chadwick & Parrott for the defendants. A trial by jury having been expressly waived by the counsel for the respective parties, the cause was tried before the court, sitting without a jury. Whereupon Charles L. Dahler was examined as a witness on the part of the plaintiff, and no witnesses were examined on the part of the defendants, and, the evidence being closed, the cause was submitted to the court for con-
94 sideration and decision; and, after due deliberation thereon, the court delivers its findings and decision in writing, which is filed, and ordered that judgment be entered in accordance therewith.

(The court, in said finding, having permitted the plaintiffs to dismiss as to all the defendants but J. M. Clarkson, who alone had been served with summons.)

Wherefore, by reason of the law and the finding aforesaid, it is ordered and adjudged that the plaintiffs, Wells, Fargo & Co., do have and recover of and from J. M. Clarkson, the defendant, the sum of twenty-six hundred and seventy-three $\frac{38}{100}$ dollars, with interest thereon at the rate of 10 per cent. per annum from the date thereof until paid, together with said plaintiffs' costs and disbursements incurred in this action, amounting to the sum of twenty dollars.

95 True copy.

CHA'S W. FOWLER, *Clerk.*
By CHA'S G. REYNOLDS,
Deputy Clk.

Judgment rendered October 26th, 1868.

Damages, $2,673 38; clerk's costs, 17 00; sheriff's do., 3 00

And afterwards, to wit, on the 14th of December, A. D. 1868, an execution was issued, which is in the following words and figures, to wit:

In the district court of the third judicial district of the Territory of Montana, in and for the county of Lewis & Clark.

In the name & by the authority of Montana Territory, to the sheriff of the said county of Lewis & Clark, greeting:

96 Whereas, on the 26th day of October, A. D. 1868, Wells, Fargo & Co. recovered a judgment in the said district court of the third judicial district of the Terr'y of Montana, in and for the county of Lewis & Clark, against J. M. Clarkson, for the sum of two thousand six hundred & seventy-three $\frac{38}{100}$ dollars damages, with interest thereon at the rate of 10 per cent. per annum till paid, together with their costs and disbursements at the date of said judgment, and accruing costs, amounting to the sum of twenty-one $\frac{60}{100}$ dollars, as appears to us of record; and whereas the judgment-roll in the action in which said judgment was entered is filed in the clerk's office of said court, in the county of Lewis & Clark, and the said judgment was docketed in said clerk's office, in the said county, on the day and year first above written,

97 and the sum of $2,694 98, with interest, is now (at the date of this writ) actually due on said judgment:

Now you, the said sheriff, are hereby required to make the said sum due on the said judgment for damages, with interest as aforesaid, and costs, and accruing costs, to satisfy the said judgment, out of the personal property of said debtor, or, if sufficient personal property of said debtor cannot be found, then out of the real property in your county belonging to him on the day whereon said judgment was docketed in the said county, or at any time thereafter; and make return of this writ within 60 days after your receipt hereof, with what you have done endorsed hereon.

98 Witness Hon. Hiram Knowles, acting judge of the said third judicial district of the Terr'y of Montana, in the county of L. & C., this 14th day of December, A. D. 1868.

Attest my hand and the seal of said court the day and year last above written.

[SEAL.]

CHA'S W. FOWLER, *Clerk.*
By CHA'S G. REYNOLDS,
Deputy Clerk.

Come to hand Dec. 14th, 1868, at one o'clock p. m.

W. K. ROBERTS, *Sheriff.*

Levy.

$2,673 38, damages.
3 00, sheriff's costs.
18 60, clerk's do.

And afterwards, to wit, on the 15th day of February, A. D. 1869, the said execution was returned and filed, with the sheriff's returns attached thereto, which is in the words and figures following to wit:

99 Having an execution in my hands of even date herewith, in the district court of the 3rd judicial district of the Territory of Montana, in and for Lewis & Clark County, in favor of John M. Clark-

son, against Wells, Fargo & Co., on a judgment dated Oct'r 10th, 1868, for the sum of five thousand dollars, and there having been paid on the same the sum of twenty-five hundred dollars, and an execution issued thereon for twenty-five hundred dollars, the ballance due thereon, I have and do apply on this execution the sum of twenty-five hundred and fourty-four $\frac{50}{100}$ dollars, as debt & interest upon the same, this 14th day of December, A. D. 1868.

W. K. ROBERTS, *Sheriff.*

Sheriff's fees on ex., 2 10; commission, 72 72.

100 In district court, 3rd judicial district.

MONTANA TERRITORY,
Lewis & Clark County:

I, Cha's W. Fowler, clerk of the district court of the third judicial district of Montana Territory, in and for the county of Lewis & Clark, do hereby certify that the foregoing twenty-nine pages, numbered from one to twenty-nine, inclusive, contain a true, full, and correct transcript of all the papers, orders, and proceedings on file and of record in my office, n the case of Wells, Fargo & Co. against John M. Clarkson and others.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 26th day of July, A. D. 1869.

SEAL.] CHA'S W. FOWLER, *Clerk.*
By CHA'S G. REYNOLDS,
Deputy Clerk.

Clerk's accrued costs, $22 60.

Filed in the office of the clerk S. C. M. T. Aug. 9, 1869. L. S. Peck, clerk.

101

102 *Index to proceedings in the sup. court, Montana T'y.*

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103 In the supreme court of Montana Territory, August term, 1869

A. MCGREGOR, ASSIGNEE OF JOHN M. Clarkson,
vs.
WELLS, FARGO & CO.

Be it remembered that, on the 16th day of August, A. D. 1870, the above-entitled cause came on for hearing, on appeal, before said supreme court, and the same was fully argued and submitted with briefs.

And afterwards, to wit, on the 13th day of January, A. D. the said cause, having been taken under advisement at
104 term of said supreme court, the judgment of the court b said cause, was affirmed, with leave to the appellant to move for a rehearing, and stay of proceedings granted until such rehearing can be had.

And afterwards, to wit, on the same day, the appellant, by its attorneys, filed a motion in writing for a rehearing of said cause, of which, in words and figures, the following is a copy, to wit:

In the supreme court of Montana Territory.

JOHN M. CLARKSON, APPELLEE,
vs.
WELLS, FARGO & CO., APPELLANTS.

105 Now comes the defendants in the above-entitled cause, by Woolfolk & Toole, its attorneys, and moves this honorable court for a rehearing therein.

WOOLFOLK & TOOLE,
Att'ys for Appellants.

(Endorsed thereon as follows, to wit:) Filed January 13th, 1870. I. R. Alden, clerk sup. court M. T.

And afterwards, to wit, on the same day, the said motion for a rehearing was allowed by the court, and the said cause set down for hearing at the next regular term of said court.

And afterwards, to wit, on the 16th day of August, A. D. 1870, at a regular term of said supreme court, the saidcause coming on reg-
106 ularly to be heard, the errors assigned on the appeal herein were fully argued by counsel, and submitted with briefs.

And afterwards, to wit, on the first day of September, A. D. 1870, the said cause coming on for final determination, it is ordered and adjudged by the court that the judgment herein of the court below be affirmed.

And afterwards, to wit, on the seventh day of September, A. D. 1870, the appellant, by its attorneys, Messrs. Woolfolk & Toole, filed with the clerk of said supreme court their writ of error on the appeal of said cause to the Supreme Court of the United States, which, in words and figures, the following is a copy, to wit:

107 UNITED STATES OF AMERICA, *ss:*

A. MCGREGOR, ASSIGNEE OF JOHN M. CLARKSON,
vs.
WELLS, FARGO & CO.

The President of the United States to the judges of the supreme court of the Territory of Montana, greeting:

Because, in the record and proceedings, and also in the rendition of

the judgment of a plea, which is in the supreme court before you, between A. McGregor, assignee of John M. Clarkson, and Wells, Fargo & Co., a manifest error has happened to the great damage of the said Wells, Fargo & Co., as by their complaint appears, we, being
108 willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.
109 Witness I. R. Alden, clerk of the supreme court in and for the district of Montana Territory, this 7th day of September, A. D. 1870, in the year of our Lord one thousand eight hundred and seventy.

[L. S.] I. R. ALDEN,
Clerk Supreme Court of Montana Territory.

(Endorsements on the foregoing:) "A. McGregor, assignee of John M. Clarkson, vs. Wells, Fargo & Co. Writ of error. Filed in the office of the clerk of the supreme court of Montana Territory this 7th day of September, A. D. 1870. I. R. Alden, clerk."

And afterwards, to wit, on the 10th day of September, A. D.
110 1870, the said appellants filed with the clerk of said court a citation, which, in words and figures, the following is a copy, to wit:

UNITED STATES OF AMERICA, *ss:*

To A. McGregor, assignee of John M. Clarkson, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the clerk of the supreme court in and for the district of Montana Territory, wherein Wells, Fargo & Co. are plaintiffs, and you are defendant in error, to show cause, if any there be, why the judg-
111 ment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable H. L. Warren, G. G. Symes, and Hiram Knowles, chief justice and associate judges of the supreme court of Montana Territory, this fifth day of September, in the year of our Lord one thousand eight hundred and seventy.

H. L. WARREN, *Chief Justice,*
G. G. SYMES, *Associate Judge,*
HIRAM KNOWLES, *Asso. Justice,*
Of Supreme Court of Montana Territory.

COUNTY OF LEWIS & CLARKE,
Territory of Montana, ss:

112 A. M. Woolfolk, being first duly sworn, deposes and says that he served a copy of the above citation upon Messrs. Chumasero

& Chadwick, attorneys for A. McGregor, assignee of John M. Clarkson, and of John M. Clarkson, by delivering to them personally the said copy at Helena City, Montana Territory, on the 8th day of September, A. D. 1870.

ALEX. M. WOOLFOLK.

Subscribed & sworn to before me this 8th day of September, 1870.
[SEAL.] MASSENA BULLARD,
Notary Public.

(Endorsed on the foregoing citation as follows, to wit:) "A. McGregor, assignee of Clarkson vs. Wells, Fargo & Co. Citation. Filed in
113 the office of the clerk of the supreme court of Montana Territory, this 10th day of September, A. D. 1870. I. R. Alden, clerk.

And at the same time and on the same day, to wit, the 10th day of September, A. D. 1870, the appellants filed with the clerk of said court their undertaking on appeal of said cause to the Supreme Court of the United States, which, in words & figures, the following is a copy, to wit:

A. McGREGOR, ASSIGNEE OF JOHN M. CLARKSON, plaintiffs and respondents,
vs.
WELLS, FARGO & CO., DEF'TS & APPELLANTS.

Supreme court of the Territory of Montana.

114 Know all men by these presents that we, Wells, Fargo & Co., Charles L. Dahler, and Henry Klein, residents and free-holders of the county of Lewis and Clarke, and Territory of Montana, are held and firmly bound unto A. McGregor, assignee of J. M. Clarkson, in the sum of eight thousand dollars, (being more than double the amount of the judgment,) to be paid to the said A. McGregor, his executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 5th day of September, A. D. 1870.

Whereas the above named Wells, Fargo & Co., (a corporation
115 duly incorporated under and by virtue of the laws of Colorado Territory,) have prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled suit, by the supreme court in and for the district of Montana Territory:

Now, therefore, the conditions of this obligation is such, that if the above-named Wells, Fargo & Co. shall prosecute their said writ of error to effect, and answer all damages and costs if they fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

WELLS, FARGO & CO. [SEAL.]
By W. C. CHILDAGH.
CHA'S L. DAHLER. [SEAL.]
116 HENRY KLEIN. [SEAL.]

Sealed & delivered in the presence of—
T. H. KLEINSCHMIDT, *ss.*

COUNTY OF LEWIS & CLARKE,
Territory of Montana, ss:

Cha's L. Dahler and Henry Klein, being first duly sworn, state that they are resident free-holders of the county of Lewis & Clarke, Montana Territory, and are each worth the sum of eight thousand dollars, over and above all their debts and liabilities, exclusive of property exempt by law from execution.

CHA'S L. DAHLER.
HENRY KLEIN.

Subscribed & sworn to before me this 5th day of September, 1870.
[SEAL.] T. H. KLEINSCHMIDT,
Notary Public.

117 DISTRICT OF MONTANA TERRITORY, *ss:*

We, the undersigned, judges of the supreme court of Montana Territory, do hereby approve of the within and foregoing bond, and order a supersedeas in the above cause.

Witness the honorable chief justice, and associate judges of the supreme court of Montana Territory, this 5th day of September, in the year of our Lord one thousand eight hundred and seventy.

H. L. WARREN,
Chief Justice.
G. G. SYMES,
Associate Judge.
HIRAM KNOWLES,
Asso. Justice of Montana Territory.

(Endorsed on the foregoing undertaking, as follows, to wit:)
"A. McGregor, assignee of J. M. Clarkson, vs. Wells, Fargo & Co.
118 Bond on appeal. Filed in the office of the clerk of the supreme court of Montana Territory, this 10th day of September, A. D. 1870.

I. R. ALDEN, *Clerk.*

119 Supreme court, Montana Territory.

I, I. R. Alden, the clerk of said supreme court of the Territory of Montana, do hereby certify the foregoing to be a full, true, and correct transcript of the proceedings in the third judicial district court of said Territory, in the case of J. M. Clarkson vs. Wells, Fargo & Co., and Wells, Fargo & Co. vs. J. M. Clarkson, and of the proceedings in said supreme court on the appeal of said cause of Clarkson vs. Wells, Fargo & Co., now on file and of record in my office.

Witness my hand and the seal of said supreme court at Virginia City, in said Territory, this 24th day of October, A. D. 1870.

[SEAL.] I. R. ALDEN, *Clerk.*

120 *Opinion of the supreme court of Montana Territory in the case of A. McGregor, assignee of J. M. Clarkson, respondent, versus Wells, Fargo & Co., appellants.*

Appeal from 3rd judicial district, Lewis & Clark County.
Woolfolk & Toole for appellants.
Chumasero & Chadwick " respondent.

Opinion by SYMES, justice:

This was an appeal from an order made by the court below, annulling and setting aside the return of the sheriff to an execution in the case, and ordering an execution to issue in favor of the assignee of the judgment.

121 Plaintiff, Clarkson, recovered a judgment for $5,000 00 against defendants, Wells, Fargo & Co., on the 18th day of July, 1868; and on the same day said plaintiff assigned one half of said judgment to Archibald McGregor, by an instrument in writing, and filed same with the clerk of the court; and, on the 14th of December, 1868, an execution was issued on said judgment for balance due thereon, $2,517 03, and interest, and delivered to the sheriff for collection. On the 15th of Feb'y, 1869, the sheriff made a return on said execution to the effect that, having an execution in his hands in favor of defendants, Wells, Fargo & Co., and against the plaintiff in said afore-mentioned execution, on a judgment in the same court, for $2,673 38 *that* he applied the amount due on said first execution as a set-off on the last-
122 mentioned execution, and returned the same satisfied. Afterwards the said McGregor moved the court to annul and set aside the return of the sheriff to the execution, and to order an execution to issue in favor of him for so much of the judgment as had been assigned to him, (the balance being paid.) The court sustained the motion; to which defendants excepted.

The only question presented is, did the court below err in sustaining the motion to quash the return of the sheriff to the execution, and directing an alias execution to issue in favor of the assignee of the judgment. This depends, first, whether sufficient appeared on the face of the judgment-roll, and the execution returned to the court to justify the court in quashing and annulling the return; and, second,
123 whether the assignment of the judgment, from Clarkson to McGregor, justified the court in directing an execution to issue in favor of the assignee.

The court could not quash or annul the return of the execution, on motion, on evidence aliunde, of irregularity, falsehood, or illegality in the conduct of the sheriff. This can only be reached by action against the sheriff for a false return, and damages resulting therefrom.

The transcript on appeal contains the judgment in favor of Clarkson against Wells, Fargo & Co., the assignment to McGregor, the execution and return of the sheriff, and the order of court and exception to same.

The judgment and execution are regular and formal, and there being no statute in this Territory authorizing the sheriff to set off one
124 execution in his hands in favor of another, or to apply one execution in payment of another, and the return on its face showing the sheriff had done this, the court committed no error in annuling and setting aside the return. A court has full power over its own process for the enforcement of its orders and judgments.

The written assignment appears to transfer the one-half interest in the

judgment from Clarkson to McGregor. No point is made that it is insufficient for that purpose.

Section 16, of our civil code, provides that in case of a transfer of interest in an action, it may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted.

125 This authorized the court to allow or direct an execution to issue in favor of the assignee, Mr. McGregor, upon motion and proof of the assignment of the judgment, and there was no error in the court sustaining that part of the motion.

The counsel for appellants attach to the transcript herein the record of a suit in which judgment was rendered in favor of Wells, Fargo & Co., against plaintiff Clarkson and others.

And their bill of exceptions shows that they offered, in defending the motion, to prove by affidavits that the indebtedness on which their judgment was rendered was purchased before they had any notice of the assignment from Clarkson to McGregor, and they file a long brief and cite numerous authorities to show that the assignment to McGregor was subject to all set-offs and equities existing at the time of or before

126 notice of assignment, and that the sheriff had legal power to set off the executions.

It is immaterial in this case whether or not the facts assumed or positions taken by appellants are correct. They could not be inquired into on the motion to annul the return for errors and irregularities appearing on the face of the papers.

The record of the case accompanying the transcript shows that the judgment in the case on which the sheriff set off the execution was not against Clarkson individually, but against him and other persons; so that the court could not have set off the judgments on motion; but it could only be done by suit in equity, showing insolvency of Clarkson & Co.

127 The doctrine that a sheriff, under common law, without any statute authorizing it, cannot set off executions is to' well settled to need discussion. Many questions were raised and argued which would affect the rights of the parties in a suit in equity; but have no bearing on a motion to annul return of sheriff on face of papers.

The court, in directing an execution to issue, ordered the sheriff to proceed and make the money, levy on property of the defendants, sell the same, and pay money to assignee.

The presumption is that officers will do their duty and proceed according to law; and it was erroneous to order particularly that the sheriff should proceed to collect the execution and the manner in which

128 he should do so; but not such as will reverse the order.

The order of the court below is affirmed.

Filed and entered September 10th, A. D. 1870.

I. R. ALDEN,
Clerk Sup. Court of Montana Territory.

A true copy. Attest:

I. R. ALDEN,
Clerk Sup. Court M. T.

(Indorsement on cover:) No. 517. Wells, Fargo & Company, plaintiffs in error, vs. A. McGregor, assignee of John M. Clarkson. Montana Terr'y sup. court. Filed 1st March, 1871.

Supreme Court of the United States.

DECEMBER TERM, 1871.

No. 292.

WELLS, FARGO AND COMPANY, *Plaintiffs in Error,*

vs.

ARCHIBALD McGREGOR, *Assignee of J. M. Clarkson.*

In Error to the Supreme Court of the Territory of Montana.

MOTION TO DISMISS.

And now comes the said Archibald McGregor, defendant in error, by his Attorney, and moves this Honorable Court to dismiss the writ of error in this case, for the want of jurisdiction, on the following grounds:

1. Because the writ of error is not brought to revise a final judgment of the Supreme Court of the Territory of Montana, but to review an order of the Court below sustaining a motion to set aside a sheriff's return on execution, and directing an *alias* execution to issue.

2. Because the original writ of error has not been returned to this Court, with the transcript of the record.

3. Because the original citation to the defendant in error, has not been returned to this Court.

4. Because the writ of error does not bear the *teste* of

the Chief Justice of this Court, but that of the Clerk of the Supreme Court of the Territory of Montana.

5. Because the amount in controversy does not appear by "the oath or affirmation of either party, or other competent witnesses," as required by the act of Congress approved May 26, 1864, entitled "An act to provide a Temporary Government for the Territory of Montana."

ROBERT LEECH,
Attorney for Defendant in Error.

POINTS AND AUTHORITIES

In Support of the foregoing Motion to Dismiss.

I.

The record in this case shows that the writ of error is brought to revise a decision of the Supreme Court of the Territory of Montana, affirming an order of the District Court for the Third Judicial District of said Territory, sustaining a motion to set aside a sheriff's return to an execution, and awarding an *alias* execution.—*Printed Record*, 6, 7, 8, 26, 27, 31, 32.

This is not a final judgment; and under the 22d section of the Judiciary act of September 24, 1789, as well as the 9th section of the Organic act of said Territory, of May 26, 1864, this Court has no jurisdiction.

McCargo *vs.* Chapman, 20 *Howard*, 555.
Early *vs.* Rogers, 16 *Howard*, 599.
Boyle *vs.* Zacharie, 6 *Peters*, 648.
Smith's Lessee *vs.* Trabue's Heirs, 9 *Peters*, 4.
Toland *vs.* Sprague, 12 *Peters*, 300.
Evans *vs.* Gee, 14 *Peters*, 1.

II.

A copy of the writ of error, and not the original, is annexed to the transcript.—*Original Record*, 107.

The original writ should always be returned to this Court, with the transcript of the record.

Mussina *vs.* Cavazos, 6 *Wallace*, 358.

III.

Only a copy of the citation to the defendant in error, has been sent to this Court.—*Original Record*, 110.

The original citation to the defendant in error, must be returned to this Court; otherwise, the case is not properly before the Court.

Wilson *vs.* Daniel, 3 *Dallas*, 401.

IV.

The writ of error does not bear the *teste* of the Chief Justice of this Court, but that of the Clerk of the Supreme Court of the Territory of Montana.—*Printed Record*, 28.

The writ is, therefore, a nullity; and this Court has no jurisdiction in the case.

In the 9th section of the act of Congress organizing the Territory of Montana, approved May 26, 1864, (13 *Statutes at Large*, 88, 89,) it is provided that "writs of error and appeals from the final decisions of the Supreme Court of said Territory, shall be allowed, and may be taken to the Supreme Court of the United States, in the same manner, and under the same regulations, as from the Circuit Courts of the United States."

By the 1st section of the act of September 29, 1789, entitled "An act to regulate Process in the Courts of the United States," (1 *Statutes at Large*, 93,) it is provided that "all writs and processes issuing from a Supreme or Circuit Court shall bear test of the Chief Justice of the Supreme Court."

The 1st section of the act of May 8, 1792, (1 *Statutes at Large*, 275, 276,) enacts that "all writs and processes issuing from the Supreme or Circuit Court shall bear test of the Chief Justice of the Supreme Court, (or if that office shall be vacant,) of the Associate Justice next in precedence."

And the form of the writ of error bearing the *teste* of the Chief Justice, was devised by the Judges of the Supreme Court of the United States, in pursuance of the 9th section of the act of May 8, 1792, (1 *Statutes at Large*, 278,) and has all the force and effect of positive law.

See Barton *vs.* Forsyth, 5 *Wallace*, 192, 193.

Mussina *vs.* Cavazos, 6 *Wallace*, 357.

This writ is not mere matter of form, but matter of substance, prescribed by law, and essential to the jurisdiction of this Court.

Hodge *et al vs.* Williams, 22 *Howard*, 88.

The form of the writ of error provided under the 9th section of the act of May 8, 1792, has been in use ever since. It runs in the name of the President, and bears the *teste* of the Chief Justice of this Court. It is in form and in fact, the process of this Court.

Mussina *vs.* Cavazos, 6 *Wallace*, 357, 358.

V.

The 9th section of the act of May 26, 1864, entitled "An act to provide a Temporary Government for the Territory of Montana," (13 *Statutes at Large*, 88, 89,) provides that writs of error and appeals from the final decisions of the Supreme Court of said Territory, may be taken to the Supreme Court of the United States, "where the value of the property, or the amount in controversy, to be ascertained by the oath or affirmation of either party, or other competent witnesses, shall exceed one thousand dollars."

This provision of the organic act of the said Territory has not been complied with, in this case. No "oath or affirmation of either party, or other competent witnesses," to the amount in controversy, accompanies the transcript of the record.

It will be seen that the statute cited expressly names

the very evidence on which the amount in controversy shall be ascertained—"*the oath or affirmation of either party, or other competent witnesses.*"

The amount in controversy is essential to the jurisdiction of this Court. Is it competent to ascertain that amount in any other manner than that required by the statute? Can this provision of law be ignored? Can this Court take jurisdiction of the case, in the absence of the required proof of the amount in controversy?

The decisions of the Territorial Courts created by acts of Congress, are subject to the appellate jurisdiction of the Supreme Court. This jurisdiction has been conferred and regulated by the acts passed, from time to time, organizing and governing the Territories respectively; and the *statute* applicable to the Territory in question, is the *guide* to the Court in such review.

1 *Abbotts' United States Practice*, 320.

ROBERT LEECH,
Attorney for Defendant in Error.